SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1968, No. 1167

ATHALIE IRVINE SMITH,

Petitioner,

v.

THE JAMES IRVINE FOUNDATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Is James Myford Irvine an heir or testamentary beneficiary of James Irvine?

2. Was James Myford Irvine an "indispensable party" within the meaning of Federal Rule of Civil Procedure 19, so that it was error for the Court of Appeals to deny plaintiff-appellant's petition for rehearing?

3. Were the findings of fact of the District Court "clearly erroneous"?

STATEMENT

Petitioner, plaintiff below, did not make a motion in the District Court under Federal Rule of Civil Procedure 19 to have James Myford Irvine joined as an indispensable party, nor did she move in the District Court to dismiss the action for failure to join an indispensable party, to wit, James Myford Irvine. Apparently, plaintiff's only reference in the District Court to joinder of necessary or indispensable parties was at page 16 of the "Reply of Plaintiff to Answer of All Defendants to Amended Complaint Except The Irvine Company, a Corporation":

> "The plaintiff has heretofore indicated to the court that the plaintiff has no objection to the joining in this action of any parties whose interests are involved in said action and may be affected by any judgment entered herein and who appear to the court to be necessary or indispensable parties to this action as provided in Rules 19 and 21 of the Federal Rules of Civil Procedure whenever the court shall determine of its own motion that said parties, whoever they may be, shall be so joined."

Plaintiff's first mention of James Myford Irvine as an indispensable party was when she petitioned the Court of Appeals for rehearing, alleging *inter alia* that he was an indispensable party and, therefore, the judgment of the Court of Appeals should have been vacated, the judgment of the District Court reversed and a new trial ordered.

ARGUMENT

I

JAMES MYFORD IRVINE WAS NOT AN INDISPENSABLE PARTY

Plaintiff's first and most important argument in support of her petition for a writ of certiorari is that an indispensable party, James Myford Irvine, was not joined and that, therefore, the judgment of the District Court and the affirmance of the Court of Appeals should be reversed and a new trial ordered. Her reasoning apparently is that there was a possibility judgment would be rendered in her favor, which would mean the share of James Irvine's estate which passed to Myford Irvine would have to be recomputed and redistributed, that because Myford Irvine was deceased his children would take his share, and because one of the children, to wit, James Myford Irvine, was not joined as a defendant, the District Court was without jurisdiction. This argument is faulty for several reasons: James Myford Irvine is not an heir or testamentary beneficiary of James Irvine; and, even if he were, he is not such an "indispensable party" under Federal Rule of Civil Procedure 19 as to require reversal of the judgment below.

A

JAMES MYFORD IRVINE IS NOT AN HEIR OR TESTAMENTARY BENEFICIARY OF JAMES IRVINE, NOR DOES HE TAKE BY RIGHT OF REPRESENTATION FROM JAMES IRVINE

Under California law, if a trust is declared invalid, the trust corpus reverts to the grantor or settlor, here

James Irvine. *E.g., Mallon v. City of Long Beach,* 44 Cal.2d 199, 208, 282 P.2 481 (1955); *Ruddick v. Albertson,* 154 Cal. 640, 643, 98 Pac. 1045 (1908); *Estate of Johnston,* 47 Cal.2d 265, 270, 303 P.2d 1 (1956); *Estate of Whitney,* 176 Cal. 12, 18, 167 Pac. 399 (1917); *Booge v. Reinicke,* 45 Cal.App.2d 260, 265, 114 P.2d 427 (1941). If the settlor died testate, the corpus is then distributed under the residuary clause of his will, if any. *Estate of Feldman,* 78 Cal.App.2d 778, 790, 178 P.2d 498 (1947). Otherwise, the corpus of the void trust is distributed by the laws of intestate succession. *Estate of Ralston,* 1 Cal.2d 724, 726, 37 P.2d 76 (1934); *Sears v. Rule,* 27 Cal.2d 131, 140, 163 P.2d 443 (1945) cert. den. 328 U.S. 843; *Hansen v. Bear Film Co.,* 28 Cal.2d 154, 172-73, 168 P.2d 946 (1946); *In re Walkerly,* 108 Cal. 627, 660, 41 Pac. 772 (1895); *Estate of Whitney, supra.*

The trust was held valid. If it had been held void, the corpus would have passed under the residuary clause of James Irvine's will. See cases cited, *supra.* The residuary clause of the will does not mention James Myford Irvine because he was born six years after the testator died. The will does state that the children of Myford Irvine would take his share by right of representation if certain grandchildren of James Irvine predeceased other grandchildren and left no issue then surviving. At the time of testator's death, all those grandchildren were alive. At the time of trial, all were alive and had issue surviving. The will of James Irvine provides that with such persons living at the time of his death, the residue of his estate shall be distributed to certain persons, but not

to the children of Myford Irvine by right of representation. This provision of the will is given effect by Section 300 of the California Probate Code:

> "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will. . . ."

In Appendix "E" of her petition plaintiff cites authority for the proposition that James Myford Irvine took from James Irvine by right of representation. A careful reading of the opinions cited indicates they are not in point. They only *define* the nature of the right of representation. They do not state when a party is *entitled* to take by right of representation. *Estate of Meyer,* 107 Cal.App.2d 799, 238 P.2d 597 (1951), does not discuss right of representation at all. It merely discusses the rights of heirs in general. Id. at 810. *Estate of Berk,* 196 Cal.App.2d 278, 16 Cal.Rptr. 492 (1961), first noted that a particular section of the California Probate Code, not applicable in the instant case, provided that the party took by right of representation, and then discussed the nature of that right. Id. at 281. In *Maud v. Catherwood,* 67 Cal.App.2d 636, 155 P.2d 111 (1945), testator's will provided that his heirs would take by right of representation. Id. at 638, 642. *Estate of Healy,* 176 Cal. 244, 168 Pac. 124 (1917), and *Lombardi v. Blois,* 230 Cal.App.2d 191, 40 Cal.Rptr. 899 (1964), are the same as *Maud v. Catherwood*: The will provided the heirs would take by right of representation.

It thus appears that the premise on which plaintiff bases her conclusion that James Myford Irvine was an indispensable party is false. James Myford Irvine is not an heir of James Irvine, James Myford Irvine was not a testamentary beneficiary of James Irvine, and James Myford Irvine did not take from James Irvine by right of representation.

If the trust had been held void, the proper parties to take the recomputed share of Myford Irvine in the estate of James Irvine were Gloria Wood Irvine and Security Pacific National Bank as executors of Myford Irvine's estate. Section 1023 of the California Probate Code provides that "If an heir, devisee or legatee dies before the distribution to him of his share of the estate, such share may be distributed to the representative of his estate. . . ." See *Holland v. McCarthy,* 177 Cal. 507, 509, 171 Pac. 421 (1918); *Rogers v. Bank of America,* 140 Cal.App.2d 228, 232, 294 P.2d 959 (1956). Gloria Wood Irvine and Security Pacific National Bank were joined as Executors of the Estate of Myford Irvine, as well as trustees of the testamentary trusts created by him. If any more property had come into Myford Irvine's estate, they would have distributed it. James Myford Irvine would be an indispensable party to any lawsuit pertaining to *that* distribution, as he is named in his father's will.

EVEN IF JAMES MYFORD IRVINE WERE AN HEIR OR BENEFICIARY, HE WAS NOT THE KIND OF INDISPENSABLE PARTY WHOSE ABSENCE WOULD REQUIRE A REVERSAL OF THE LOWER COURT JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 19

As noted in the statement of the case in this brief, plaintiff did not make any contention or motion concerning James Myford Irvine as an indispensable party until her petition for rehearing in the Ninth Circuit. The procedure to be followed when deciding whether a trial court judgment entered after an extensive trial (which in the instant case lasted many weeks) should be reversed and vacated on the ground that an indispensable party was not joined is set forth in *Provident Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968).

Applying this procedure to the instant case, it seems plain there was no error on the part of the Ninth Circuit Court of Appeals in denying plaintiff's petition for rehearing. Federal Rule of Civil Procedure 19(b) sets out interests that should be examined to determine whether, in equity and good conscience, the lower court verdict should be reversed because James Myford Irvine was not joined. 390 U.S. at 109; Federal Rule of Civil Procedure 19. The factors which seem most relevant here are: First, the extent to which the judgment entered in James Myford Irvine's absence is prejudicial to him or to those who were parties; second, the interest of the courts and the public in a complete, consistent and efficient settlement of controversies. 390 U.S. at 109-11; Federal Rule of Civil Procedure 19. These

factors must be considered in light of judgment, binding on the parties although not binding on James Myford Irvine, having been reached after extensive litigation. 390 U.S. at 109.

In this lengthy case, the District Court entered a judgment which held that the trust of James Irvine was valid. The effect of this was to preserve the status quo exactly as it was prior to the lawsuit. Therefore, the interests of James Myford Irvine, as well as everyone else involved, were not changed or affected in any way. Plaintiff now sets forth the argument that because there was a possibility the interests of James Myford Irvine *could* have been affected if the judgment had gone the other way, the District Court judgment must be reversed and vacated and a new trial held with James Myford Irvine joined. It is now too late for plaintiff to make this argument. Id. at 116.

II

THE FINDINGS OF FACT IN THE DISTRICT COURT WERE NOT CLEARLY ERRONEOUS

Plaintiff's arguments set forth at pages 11 through 35 of her petition, that is, that there was no delivery of the trust instrument, that James Irvine exerted acts of ownership over the Irvine stock during his lifetime, that The Irvine Foundation did not exert ownership or control over the stock during the lifetime of James Irvine, and that the trust had charitable and non-charitable purposes, are basically complaints that the District Court findings of fact were decided adversely to her. Plaintiff must show that the findings themselves were clearly erroneous. Federal Rule of Civil Procedure 52(a); *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956); *International Boxing Club, Inc. v. United States*, 358 U.S. 242 (1959). This she has not done.

CONCLUSION

Under the laws of the State of California, James Myford Irvine is not an heir or testamentary beneficiary of James Irvine. The proper party defendants to this lawsuit were *inter alia* the Executors of the Estate of Myford Irvine, his father. Plaintiff's contention James Myford Irvine is an indispensable party is plainly wrong.

For the foregoing reasons, it is respectfully submitted the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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